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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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IN THE COURT OF CRIMINAL APPEALS
SITTING IN AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
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PHILLIP ANDREW CAMPBELL	*	
	*	
VS.	*	NO. PD-0449-21
	*	
THE STATE THE TEXAS	*	

STATE'S BRIEF

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ORAL ARGUMENT NOT REQUESTED

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INDEX OF AUTHORITIES

Cases

NO. PD-0449-21

IN THE COURT OF CRIMINAL APPEALS
SITTING IN AUSTIN, TEXAS

PHILLIP ANDREW CAMPBELL
APPELLANT

VS.

THE STATE OF TEXAS
APPELLEE

STATE'S BRIEF
ON
DISCRETIONARY REVIEW

TO THE HONORABLE JUDGE OF THE COURT OF CRIMINAL APPEALS:

The State of Texas, by and through her District Attorney, respectfully submits this brief in the above entitled and numbered cause

STATEMENT OF THE CASE

Appellant was indicted on December 14, 2017 for one count of "Murder" (i.e., Count One) and one count of "Tampering with Physical Evidence" (i.e., Count Two).[1] Prior to voir dire, however, the State announced that it was going to sever Count Two and proceed only Count One.[2] At trial, Appellant entered a plea of "not guilty."[3] At the close of guilt/innocence, the jury found Appellant guilty as

[1] C.R., pp. 22, 24.
[2] *Id.* at 158; R.R. Vol. 3, pp. 4, 5.
[3] R.R. Vol. 4, pp. 13, 14.

charged.[4] Following the punishment phase, the jury sentenced Appellant to life in the Texas Department of Criminal Justice-Institutional Division.[5] A fine of $10,000.00 was also assessed.[6] On May 19, 2021, the Tenth Court of Appeals affirmed the conviction in a memorandum opinion (Justice Gray dissenting). Appellant filed a petition for discretionary review on June 23, 2021. The Court of Criminal Appeals granted discretionary review on September 9, 2021.

[4] C.R., pp. 138, 167-169; R.R. Vol. 6, pp. 226, 227.
[5] C.R., pp. 152, 167-169; R.R. Vol. 7, pp. 127, 128.
[6] *Id.*

STATEMENT OF FACTS

On October 5, 2017 Alexandria Wright, unable to come up with the money to make her car payment, turned to an acquaintance/friend (i.e., Appellant) for help.[7] An agreement was made whereby Appellant would meet Wright at the Days Inn Hotel in Burleson (Johnson County), Texas (located at 329 S. Burleson Blvd.) and that Appellant would loan $300.00 to Wright in exchange for sexual favors.[8] After meeting at Miranda's, a nearby Mexican bar and restaurant, Appellant and Wright walked over to the Days Inn Hotel and, at 8:34 p.m., rented room 212 for the night.[9]

Once in the hotel room, Appellant and Wright began a night of abusing drugs and having sex together.[10] At one point during the night Appellant, who had recently developed an interest in erotic asphyxiation, began choking Wright during intercourse.[11] As a result, Wright died of manual strangulation.[12] Upon realizing that Wright was dead, Appellant panicked and began to formulate what course of action to take.[13] With an 11:00 a.m. check-out time approaching, and being unable

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[7] R.R. Vol. 4, pp. 113, 116-118, 122, 123, 176; R.R. Vol. 6, pp. 79, 81.
[8] R.R. Vol. 4, pp. 28, 29, 85, 119; R.R. Vol. 6, pp. 83, 85, 110, 118.
[9] R.R. Vol. 4, pp. 87, 92, 101; R.R. Vol. 5, pp. 127, 163-165; R.R. Vol. 8, State's Exhibit No. 6.
[10] R.R. Vol. 6, pp. 85, 86, 113, 117-120, 123, 124.
[11] R.R. Vol. 4, p. 270, R.R. Vol. 5, pp. 136-146; R.R. Vol. 6, pp. 49, 51, 53, 55, 56, 62-24, 68, 69, 122, 124-126; R.R. Vol. 8, State's Exhibit Nos. 300-307, 309.
[12] R.R. Vol. 5, pp. 15, 22-26,28-32, 46; R.R. Vol. 6, pp. 124-127; R.R. Vol. 8, State's Exhibit No. 48.
[13] R.R. Vol. 6, pp. 128-134, 136.

to decide what to do, Appellant went to the front desk to rent the room for another day.[14] Finally, around 10:00 that night (i.e., October 6, 2017), Appellant went to the hotel lobby, asked that they call 911, and then returned to room 212 and waited for the police to arrive.[15] Due to the effects of the amount of drugs and alcohol that Appellant had recently consumed, he was transported to John Peter Smith hospital in Fort Worth for treatment.[16] There, he was arrested on charges of Murder.[17]

[14] R.R. Vol. 4, pp. 31, 32, 34, 35, 41-43, 89, 93, 94, 105; R.R Vol. 6, pp. 130, 131; R.R. Vol. 8, State's Exhibit No. 7.
[15] R.R. Vol. 4, pp. 23, 28-30, 97, 98; R.R. Vol. 6, pp. 138, 139; R.R. Vol. 8, State's Exhibit No. 1.
[16] R.R. Vol. 4, pp. 40, 54, 56, 76, 77, 80, 216, 221, 281, 283; R.R. Vol. 6, pp. 129, 130, 134; R.R. Vol. 8, State's Exhibit Nos. 32-47.
[17] R.R. Vol. 3, pp. 57, 237, 294; R.R. Vol. 6, pp. 26, 27.

REPLY TO APPELLANT'S GROUND OF REVIEW NUMBER ONE:

The trial court did not err in holding that there was no harm in the abstract portion of the jury charge for failing to limit the definition of "intentionally" to result-of-conduct in a Murder case indicted under TEX. PENAL CODE ANN. §§ 19.02(b)(1) and (b)(2).

In Appellant's Ground of Review Number One, he argues that the Tenth Court of Appeals erred in holding that there was no harm in the jury charge in guilt/innocence when the State, in the abstract portion of the charge, failed to limit the definition of "intentionally." Specifically, Appellant claims that in a murder case (a result-of-conduct offense) it was theoretically possible for the jury to have convicted him under 19.02 (b)(1) merely because he intentionally committed the underlying conduct (i.e., strangulation of the victim). The State of Texas respectfully disagrees.

ISSUES PRESENTED
ONE

If the abstract portion of the jury charge failed to limit the definition of "intentionally" to result-of-conduct in a murder case, did Appellant suffer actual harm when (1) the application paragraph, the indictment, the relevant statute, the State's evidence and closing argument all limited the jury's focus to result-of-conduct and (2) the jury charge, which also contained the lesser-included offenses of "Manslaughter" and "Criminal Negligent Homicide," allowed the jury to find

Appellant not guilty of Murder if they believed that he intended the underlying conduct, but not the result?

A. Summary of argument.

The Tenth Court of Appeals did not err in holding that Appellant did not suffer actual harm from the failure of the abstract portion of the jury charge to limit the definition of "intentionally" to result-of-conduct in a murder case. A review of the application paragraph, the indictment, the relevant statutes (TEX. PENAL CODE ANN. §§ 19.02(b)(1) and (b)(2), evidence adduced at trial, and the State's closing argument all limited the jury's focus to the result-of-conduct definition of "intentionally." Moreover, the included lesser-included offenses of "Manslaughter" and "Criminal Negligent Homicide" allowed the jury to find Appellant not guilty of "Murder" if they believed he intended the underlying conduct, but not the result.

B. Relevant facts.

In Count One of the indictment, Appellant was charged with "Murder" under three different theories. Tracking TEX. PENAL CODE ANN. § 19.02(b)(1), Paragraph One of the indictment alleged, *inter alia*, that Appellant intentionally *or* knowingly caused the death of Alexandria Wright.[18] Paragraph Two alleged under TEX. PENAL CODE ANN. § 19.02(b)(2) that Appellant, with intent to cause

[18] C.R., pp. 22, 24; R.R. Vol. 4, p. 14.

serious bodily injury to Alexandria Wright, committed an act clearly dangerous to human life that caused the death of Alexandria Wright by impeding the normal breathing or the circulation of the blood of Alexandria Wright or applying pressure to the throat or neck of Alexandria Wright.[19]

The abstract portion of the jury charge in guilt/innocence limited the definition of "knowingly" to result-of-conduct (pertaining to Murder under Section 19.02(b)(1)).[20] The abstract portion of the charge, however, gave the complete definition of "intentionally" (as it applied to both nature-of-conduct and result-of-conduct scenarios) and read as follows:

> A person acts intentionally or with intent with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.[21]

The abstract portion of the jury charge further instructed that:

> A person commits the offense of manslaughter if he recklessly causes the death of an individual.[22]
>
> A person acts recklessly, or is reckless, with respect to a result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would

[19] *Id.*
[20] C.R., p. 131; R.R. Vol. 6, p. 180.
[21] *Id.*
[22] C.R., p. 130; R.R. Vol. 6, p. 180 .

> exercise under all the circumstances as viewed from the actor's standpoint.[23]

The application paragraph for "Murder" under TEX. PENAL CODE ANN. §§ 19.02(b)(1) and 19.02(b)(2) stated in relevant part:

> [I]f you believe from the evidence beyond a reasonable doubt that [Appellant] did…intentionally or knowingly cause the death of…Alexandria Wright, by impeding the normal breathing or circulation of the blood of Alexandria Wright or by applying pressure to the throat or neck of Alexandria Wright or that [Appellant] did…with the intent to cause serious bodily injury to…Alexandria Wright, commit and act clearly dangerous to human life that caused the death of Alexandria Wright by impeding the normal breathing or circulation of the blood of Alexandria Wright, then you will find [Appellant] guilty of the offense of "Murder" as charged in the indictment.[24]

The application paragraph then included an instruction on the lesser-included-offense of "Manslaughter" to accommodate Appellant's theory of the case (i.e., he intended the act of erotic asphyxiation, but did not intend for the act to kill Wright). This application paragraph stated in relevant part:

> But if you do not so believe, or if you have reasonable doubt thereof, you will acquit the Defendant of the offense of Murder and next consider the lesser-included offense of Manslaughter.[25]

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[23] C.R., p. 131; R.R. Vol. 6, p. 180.
[24] C.R., p. 132; R.R. Vol. 6, pp. 181, 182.
[25] C.R., p. 132; R.R. Vol. 6, p. 182, 183.

> [I]f you believe from the evidence beyond a reasonable doubt that [Appellant] did then and there recklessly cause the death of …Alexandria Wright, by impeding the normal breathing or circulation of the blood of Alexandria Wright or by applying pressure to the throat or neck of Alexandria Wright, then you find [Appellant] guilty of the offense of lesser-included offense of Manslaughter and so say by your verdict,...[26]

The jury charge also provided the option to consider the lesser-included offense of Criminal Negligence.[27]

Defense counsel objected to the jury charge on the basis that it failed to limit the definition of "intentionally" in that "Murder" is a result-of-conduct offense.[28] The State responded that it needed the full definition of "intentionally" because it believed (incorrectly) that "Murder," under TEX. PENAL CODE ANN. § 19.02(b)(2), involved both a result-of-conduct and nature-of-conduct culpable mental state.[29] Agreeing with the State, the trial court overruled defense counsel's objection to the charge.[30]

C. Relevant law.

Error occurs when the charge permits the jury, by applying broad definitions of culpable mental states, to convict a defendant of a "result-oriented offense"

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[26] C.R., pp. 132, 133; R.R. Vol. 6, pp. 182, 183.
[27] C.R., pp. 130, 131, 133; R.R. Vol. 6, pp. 183, 184.
[28] R.R. Vol. 6, pp. 176, 177.
[29] *Id.* at 177.
[30] *Id.* at 178.

without finding that he intended the result of his conduct.[31] Thus, when the charge defines the culpable mental state in relation to both the nature of the conduct and the result of the conduct, rather than limiting its definition to the *result* only, the charge is erroneous.[32]

D. Standard of review.

When reviewing allegations of charge error, an appellate court must first determine whether error actually exists in the charge.[33] If error is found, the court must determine whether it caused sufficient harm to require reversal.[34] The degree of harm required for reversal depends on whether the error was preserved.[35] If no proper objection was made at trial, the error requires reversal only if it is so egregious and created such harm that the appellant has not had a fair and impartial trial.[36] When there is a timely objection to an improper jury charge, the error requires reversal unless it is harmless.[37] Such a review, however, requires that the Appellant show that he suffered *actual*, rather than theoretical harm from the error in the jury charge.[38] The actual degree of harm must be assayed in light of the

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[31] *Guzman v. State,* 988 S.W. 2d 884, 886 (Tex. App.-Corpus Christi 1999, *no pet.*).
[32] *Id., citing, Cook v. State,* 884 S.W. 2d 485, 490 (Tex. Crim. App. 1994).
[33] *Ngo v. State,* 175 S.W. 3d 738, 743 (Tex. Crim.App. 2005).
[34] *Id.* at 744.
[35] *Arline v. State,* 721 S.W. 2d 348, 351 (Tex.Crim.App. 1986).
[36] *Almanza v. State,* 686 S.W. 2d 157, 171 (Tex. Crim. App. 1984).
[37] *Id.*
[38] *Arline,* 721 S.W. 2d at 351.

entire jury charge, the state of the evidence, (including the contested issues and weight of probative evidence) the argument of counsel, and any other relevant information revealed by the record of the trial as a whole.[39]

E. No reversible error in the jury charge concerning Count One.

1. Concerning the culpable mental state of intent, the jury's focus was properly limited only to result-of-conduct.

In his brief, Appellant asserts that the Tenth Court of Appeals wrongfully held that error in the jury charge (for not limiting the definition of "intentionally" to result-of-conduct) was harmless. According to Appellant, it was theoretically possible that the jury convicted him of Murder merely because they believed that he intentionally choked Alexandria Wright. The State of Texas respectfully disagrees.

In assessing harm resulting from the inclusion of improper "conduct elements" in the definitions of culpable mental states, a reviewing court may consider the degree, if any, to which the culpable mental states were limited by the application portions of the charge.[40] This is so because it is the application paragraph of the charge, not the abstract portion, that authorizes a conviction.[41]

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[39] *Almanza v. State,* 686 S.W. 3d at 171.
[40] *Patrick v. State,* 906 S.W. 2d 481, 492 (Tex. Crim. App. 1995); *Riggs v. State,* 482 S.W. 3d 270, 275 (Tex. App.-Waco 2015, *pet. ref'd.*).
[41] *Yzaguirre v. State,* 394 S.W. 3d 526, 530 (Tex. Crim. App. 2013).

Thus, a court looks to the wording of the application paragraph of the jury charge to determine whether the jury was correctly instructed in accordance with the indictment and also what the jury likely relied upon in arriving at its verdict.[42]

Here, the application paragraph properly limited the culpable mental state of "intentionally" under § 19.02(b)(1)) to result-of-conduct (i.e., that Appellant intentionally caused the death [result] of Alexandria Wright). Also under § 19.02 (b)(1), the culpable mental state of "knowingly" was limited by both the application paragraph and the abstract portion of the jury charge to result-of-conduct. And, under § 19.02(b)(2), intent was limited to causing serious bodily injury [result]. In turn, this language in the application paragraph tracked both the language in the indictment and in the statute. As such, the jury was correctly instructed in accordance with the indictment to properly authorize a conviction.

In addition, the actual degree of harm must be determined in light of the entire jury charge.[43] Here, the charge permitted the jury to take into consideration Appellant's version of the events. At trial, Appellant took the stand and admitted that he choked Wright during sex, but stated that he did not intend to kill her.[44] In other words, Appellant claims that he intended the act of choking Wright; he was

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[42] *Id.*
[43] *Almanza*, 686 S.W. 2d at 171.
[44] R.R. Vol. 6, pp. 85, 119, 122, 124, 126, 140, 141, 143, 153, 154.

just either reckless or negligent as to the result of his actions. Thus, if the jury believed Appellant, the charge instructed them to find Appellant "not guilty" of Murder and then to consider next the lesser-included offenses of Manslaughter and Criminal Negligent Homicide.

An assessment of actual degree of harm must also take into consideration the state of the evidence and the prosecution's closing arguments.[45] Here, evidence adduced at trial revealed that Appellant possessed numerous pornographic videos—some 9-12 of these videos were "snuff" films involving violent acts of rape, manual strangulation, and necrophilia.[46] This suggested that Appellant not only had a prurient interest in erotic asphyxiation, but also had a perverse desire to choke a person to death and then have sex with their dead body. This suggestion was further supported by evidence that Appellant not only had begun to act out his fantasy, but that his actions were escalating toward his ultimate goal. Robin Critz (i.e., Appellant's girlfriend) testified that a few months prior to Wright's death, Appellant expressed an interest in role playing acts of him choking her while have sexual intercourse.[47] Critz and Appellant both testified that she agreed to such acts, but only if he would stop choking her when she gave him a signal.[48] Critz further

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[45] *Almanza*, 686 S.W. 2d at 171.
[46] R.R. Vol. 4, p. 270; R.R. Vol. 5, pp. 136-146; R.R. Vol. 8, State's Exhibit Nos. 300-307, 309.
[47] R.R. Vol. 6, pp. 49, 51, 53, 62, 64, 68, 69, 72.
[48] *Id.* at 49, 51, 53, 54, 62, 64, 68, 69, 72, 85, 154.

testified that during said role playing, she once blacked out from the choking.[49] In addition to showing escalation, the significance of Critz's testimony was that Appellant now knew both how to choke a person to the point of unconsciousness and how long it would take to achieve this result. According to the testimony of Dr. Nizam Peerwani (who performed the autopsy on Wright), choking a person to the point of unconsciousness requires a constant, strong compressive force to both carotid arteries for approximately three minutes (after which irreversible brain damage begins to occur).[50]

That Appellant strangled Wright to the point of unconsciousness was established by Appellant's admission during his testimony and Peerwani's testimony that the cause of Wright's death was manual strangulation.[51] Evidence that Appellant intended to cause Wright's death (by strangulation) was established by Peerwani who testified that hemorrhaging to both of the victim's eyes, contusions to both sides of the victim's neck, hemorrhaging to the inner surface of the anterior neck (strap) muscles, and a fracture to the horns of the thyroid cartilage indicated death by manual strangulation.[52] More importantly, however, Peerwani testified that it would take a strong, compressive force to both carotid arteries

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[49] *Id.* at 55, 56, 63.
[50] R.R. Vol. 5, pp. 28-31, 34-36.
[51] *Id.* at 15, 23-25,28-32,37-39,46, 87; R.R. Vol. 6, pp. 119, 122, 124, 126, 140, 141, 143; R.R. Vol. 8, State's Exhibit No. 48.
[52] R.R. Vol. 5, pp. 7, 10, 15-18, 20, 22-32, 47; R.R. Vol. 8, State's Exhibit Nos. 48-100.

(depriving the brain of oxygen) for some three-five minutes (possibly longer if the victim struggles) to cause the brain to fail (resulting in death).[53] In other words, Appellant would have had to choked Wright approximately two minutes beyond her losing consciousness (an event he most likely would have observed and expected) in order to cause her death. As such, the evidence strongly indicated that Appellant had the conscious objective and desire to cause Wright's death.

The prosecution, in its closing argument, limited the jury's focus to result-of-conduct by emphasizing: (1) Appellant's fantasy with violent rape, brutalization, and murder; (2) Appellant's acting out of his deviant sexual fantasy with Critz; (3) the escalation of his fantasy; and (4) Appellant's opportunity with Wright to achieve his ultimate fantasy (i.e., necrophilia).[54] The State the drove the point home (i.e., that this case was solely about Appellant's intent to cause Wright's death) by dramatically re-enacting Wright's death using Peerwani's time table. Wrapping his hands around the imaginary neck of Wright, the prosecutor took the jury through the full progression of events: at the 45 second mark, the prosecutor announced that Wright is beginning to realize that something is wrong and she starts to fight; at the two-minute mark, the prosecutor announced that Wright is beginning to get light headed and that panic is setting in; at the three-

[53] R.R. Vol. 5, pp. 28-31, 34.36.
[54] R.R. Vol. 6, pp. 193, 195, 216, 217, 223.

minute mark, the prosecutor stated that Wright is unconscious, her brain is screaming for blood, and her face begins to turn purple [visible to Appellant]; then, after making the jury watch him strangle the imaginary neck of Wright for an additional two minutes, the prosecutor announced that Wright was dead.[55] Thus, because (1) Appellant (from his experience with Critz) knew how long it took to choke a person to the point of unconsciousness and (2) Appellant would have observed Wright blacking out, the prosecutor's forcing of the jury to endure watching him strangle the imaginary neck of Wright for an additional two minutes demonstrated for the jury that Appellant's conscious objective or desire was not the act of choking Wright, but to cause her death to fulfill a sick fantasy. Therefore, for the reasons stated above, Appellant was not actually harmed by the failure of the abstract portion of the charge to limit the definition of "intentionally" to result-of-conduct.

Accordingly, the Tenth Court of Appeal did not err in holding that Appellant did not suffer actual harm from the jury-charge error and; as such, the Court of Criminal Appeals should not overrule the Tenth Court of Appeals's affirmance of Appellant's conviction.

[55] *Id.* at 224, 225.

CONCLUSION AND PRAYER

For the reasons previously stated, it is respectfully submitted that there was no reversible error contained in the Tenth Court of Appeals' opinion.

WHEREFORE, PREMISES CONSIDERED, the State respectfully prays that Appellant's Petition for Discretionary Review be denied and Appellant's conviction for "Murder" be affirmed.

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CERTIFICATE OF COMPLIANCE

The State of Texas, by and through her District Attorney, hereby certified that its Brief contains 2,677 words and that it meets the length requirement for a computer generated document as dictated by TEX. R. APP. PROC. 9.4(i)(2) (eff. 12/01/2012).

/s/ David W. Vernon
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